IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. — 75-6081

JOSEPH COUGHLIN, et al.,

Petitioners,

vs.

FRANK STACHULAK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CITATIONS:

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PRAYER

The petitioners, Joseph Coughlin, Ezra Brantley and Terry Brelje, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 6, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion rendered by the District Court for the Northern District of Illinois, Eastern Division, is reported at 369 F. Supp. 628.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 6, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether due process requires that the standard of proof beyond a reasonable doubt be employed for commitment under the Illinois Sexually Dangerous Persons Act.

STATUTORY PROVISIONS INVOLVED

Illinois Revised Statutes, Chapter 38:

§ 105–1.01 Sexually Dangerous Persons — Definition.

All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities towards acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.

§ 105–3.01 Civil Nature of Proceedings — Procedure.

The proceedings under this Act shall be civil in nature. The provisions of the Civil Practice Act, including the provisions for appeal, and all existing and future amendments of said Act and modifications thereof and the rules now or hereafter adopted pursuant to said Act shall apply to all proceedings hereunder except as otherwise provided in this Act.

STATEMENT OF THE CASE

The Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat. Chap. 38, § 105-1.01 through 105-12 (hereinafter referred to as the ISDPA), is a civil statute enacted for the protection of society and the treatment of the serious sexual offender. It is similar to sex offender statutes enacted by the majority of the States. *Annotation*, 34 ALR 3d 652.

The ISDPA provides that when a person has been charged with a crime, the State's Attorney or Attorney General may file a petition stating that such person is sexually dangerous; case law requires that the crime charged be a serious sexual offense involving sexual assault or the sexual molestation of children, not a mere sexual nuisance offense. The ISDPA further provides for an examination by two psychiatrists, representation by appointed counsel, and the right to a jury trial. If found to be sexually dangerous, the person is committed to the custody of the Director of Corrections, and has the statutory right to treatment geared to effect recovery. He retains the right to appeal, and may at any time petition for release on the basis of recovery, and has the right to a jury trial on the issue of his recovery.

Respondent, Frank Stachulak, brought this action pursuant to the Federal Civil Rights Act, 42 U.S.C. § 1983 and the Federal Habeas Corpus Act, 28 U.S.C. § 2254 to challenge his commitment under the ISDPA. Respondent filed this action against the Acting Director of the Department of Corrections, the Warden of the Illinois State

Penitentiary at Menard, and the Administrator of the Menard Psychiatric Division.[1] Prior to his commitment on November 25, 1969, the respondent had been convicted of Public Indecency, Possession of Lewd Drawings, Contributing to the Delinquency of a Child, and had been arrested on three charges of Indecent Solicitation of a Child. After the three arrests involving Indecent Solicitation, the State's Attorney of Cook County, Illinois filed a petition before the Circuit Court of Cook County charging the respondent with being a sexually dangerous persons as defined in Ill. Rev. Stat. Chap. 38, § 105–1.01. A jury trial on the petition was held on October 9, 1969. Although the ISDPA does not explicitly state what standard of proof is to be applied by the finder of fact for commitment, proceedings under the ISDPA are denominated as civil in nature (§ 105–3.01), and thus the jury was instructed that in order to find the respondent to be sexually dangerous the State must prove the facts in issue by a preponderance of the evidence. The jury found the respondent to be sexually dangerous, and the court remanded the respondent to the custody of the Illinois Director of Corrections, who confined the respondent at the Menard Psychiatric Division of the Illinois Department of Corrections for care and treatment designed to effect recovery.

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1. Since the inception of this action, the original petitioners have left their respective offices. The persons now serving in the abovementioned capacities are: Allyn R. Sielaff, Director of the Illinois Department of Corrections; Thomas Isreal, Warden of the Illinois State Penitentiary at Menard; and William H. Crane, M.D., Administrator of the Menard Psychiatric Division.

On December 11, 1973, the District Court for the Northern District of Illinois, Judge Abraham Lincoln Marovitz presiding, issued a Writ of Habeas Corpus pursuant to respondent's complaint for relief under the federal Civil Rights and Habeas Corpus Acts. The Court found the ISDPA to be constitutional except for the standard of proof applied, and held that procedural due process required that the respondent's propensity to commit further sexual acts must be proved beyond a reasonable doubt, relying upon this Court's decision in *In re Winship*, 397 U.S. 358 (1970). On appeal, the Seventh Circuit Court of Appeals agreed with the District Court that *Winship* was controlling, and held that due process required that the reasonable doubt standard be applied to proceedings under the ISDPA, despite the difficulties inherent in predicting whether the respondent might commit criminal sexual assaults in the future.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL IN STRIKING DOWN A STATE SEX OFFENDER STATUTE FOR ITS FAILURE TO REQUIRE PROOF BEYOND A REASONABLE DOUBT.

The decision below represents the first occasion when a federal Court of Appeals has struck down an otherwise valid state sex offender statute on a federal habeas corpus proceeding for its failure to require proof beyond a reasonable doubt.[2] While four other states have imposed the standard of beyond a reasonable doubt by judicial decision,[3] the great majority of jurisdictions hold that the

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2. *Lessard* v. *Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), requiring proof beyond a reasonable doubt in a civil involuntary commitment proceedings, has been vacated by this Court on other grounds after remand. ——U.S.——, 43 U.S.L.W. 3600 (U.S. May 12, 1975); *In re Ballay*, 482 F. 2d 648 (D.C. Cir. 1973), requiring proof beyond a reasonable doubt in a civil involuntary commitment proceeding, was a decision by the District of Columbia Circuit Court acting in its supervisory capacity in construing a District of Columbia statute.

3. *People* v. *Burnick*, 535 P. 2d 452 (Cal. 1975); *Ex Parte Perry*, 43 A. 2d 885 (N.J. 1945); *In re Pickles*, 170 So. 2d 603 (Fla. 1965); *Denton* v. *Commonwealth*, 383 S.W. 2d 681 (Ky. 1964).

proper standard of evidence in sex offender statutes and involuntary civil mental illness commitment statutes is proof by a preponderance of the evidence. *Developments in the Law; Civil Commitment of the Mentally Ill,* 87 Harvard L. Rev. 1190, 1298 (1974). All of the other federal courts which have considered the issue of standard of proof for state sex offender statutes on federal habeas corpus proceedings have held that the civil standard of proof by the preponderance of the evidence, or the slightly higher standard of proof by "clear and convincing evidence," is consistent with the requirements of procedural due process. *Tippett* v. *State of Maryland,* 436 F. 2d 1153 (4 Cir. 1971), affirming 295 F. Supp. 389 (D. Md. 1969), cert. dismissed sub. nom. *Murel et al.* v. *Baltimore City Criminal Court et al.,* 407 U.S. 355 (1972); *Dixon* v. *Commonwealth,* 325 F. Supp. 966 (D. Pa. 1971); *Lynch* v. *Baxley,* 386 F. Supp. 378 (D. Ala. 1974; 3-judge court); see also *United States* v. *Brown,* 478 F. 2d 606 (D.C. Cir. 1973); *In re Levias,* 517 P. 2d 588 (Wash. 1973; *en banc*). These conflicts justify the grant of certiorari to review the judgment below.

The conflict between the Seventh Circuit's ruling and those of other federal courts in considering this issue is heightened by the fact that the Seventh Circuit's decision struck down a statute containing all the procedural safeguards required by this Court and other federal Circuit Courts of Appeal. In *Specht* v. *Patterson,* 386 U.S. 605 (1966), this Court held that due process requires that an accused sex offender be given the right to be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. In *Humphrey* v. *Cady,* 405 U.S. 705 (1972), this Court held that the

Equal Protection Clause required that an accused sex offender be afforded the right to trial by jury where such a right is granted to prospective committees under the state's mental health code. In construing the ISDPA, the Illinois state courts have demanded the application of procedural standards that meet and surpass the requirements of this Court.[4] The same or similar sex offender statutes

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4. The Illinois state courts have held that, even though the Act is civil, the strictest standards of due proces must be observed, since deprivations of personal liberty are involved. *People* v. *Capoldi,* 10 Ill. 2d 261, 139 N.E. 2d 776 (1957) The petition filed by the prosecutor must be strictly construed as to its legal sufficiency. *People* v. *McDonald,* 44 Ill. App. 2d 348, 194 N.E. 2d 541 (2nd Dist. 1963). A defendant under the Act retains his privilege against self-incrimination, his right to a speedy trial (*People* v. *Beshears,* 65 Ill. App. 2d 446, 213 N.E. 2d 55 (5th Dist. 1965)), and his right to confront state witnesses. *People* v. *Nastasio,* 19 Ill. 2d 524, 168 N.E. 2d 728 (1960) An accused retains his constitutional right to appear and defend in person, and to meet the witnesses face to face; he may not be found sexually dangerous based merely upon affidavits and records. *Potts* v. *People,* 80 Ill. App. 2d 195, 224 N.E. 2d 281 (Ill. App. 1967). An accused must be fully advised of his right to the assistance of counsel both prior to his psychiatric examination (*People* v. *Potter,* 85 Ill. App. 2d 151, 228 N.E. 2d 238) and at trial (*People* v. *Breese,* 34 Ill. 2d 61, 213 N.E. 2d 500 (Ill. 1966), and of his right to trial by jury (*People* v. *Pygott,* 64 Ill. App. 2d 284, 211 N.E. 2d 382 (1965). He also has the right to contest at a preliminary hearing the voluntariness of all statements to be introduced at trial. (*People* v. *Capoldi,* 10 Ill. 2d 261, 139 N.E. 2d 776 (Ill. 1957) In addition to his right to a jury trial on the question of his sexual dangerousness, the accused must be granted a jury trial upon

have been upheld as constitutional by this Court and by every Federal Circuit which has considered the issue. *Pearson* v. *Probate Court,* 309 U.S. 270 (1940); *Tippett* v. *State of Maryland,* 436 F. 2d 1153 (4th Cir. 1971), affirming *Sas* v. *State of Maryland,* 295 F. Supp. 389 (D. Md. 1969), *cert. dismissed,* 92 S. Ct. 2091; *Peterson* v. *Gaughan,* 404 F. 2d 1375 (1 Cir. 1968); *Hill* v. *Burke,* 422 F. 2d 1195 (7 Cir. 1970) (upholding the Wisconsin Sex Deviate Act); *Kimmerer* v. *Benson,* 165 F. 2d 702 (6 Cir. 1948) (upholding Michigan Sexual Psycopath Act); *Malone* v. *Overholser,* 93 F. Supp. 647 (D.C. 1950), followed in *Miller* v. *Overholser,* 206 F. 2d 415 (D.C. Cir. 1958), and *In re Alexander,* 336 F. Supp. 1305 (D.C. 1972) (upholding the District of Columbia Sexual Psychopath Act).

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request each time he files a petition for release. *People* v. *Shiro,* 52 Ill. 2d 279, 287 N.E. 2d 708 (Ill. 1972). The accused has a right to a speedy trial within 120 days upon filing such a petition for a writ of recovery. *People* v. *Abney,* 90 Ill. App. 2d 235, 232 N.E. 2d 784 (Ill. App. 1967) There is no limit to the number or frequency of petitions for writs of recovery that a person committed under the Illinois Sexually Dangerous Persons Act may file. *People* v. *Haywood,* 96 Ill. App. 2d 334, 239 N.E. 2d 321 (5th Dist. 1968). The fact that an adjudicated sex offender has not supplied the trial court with a psychiatric report accompanying his petition for writ of recovery, as required by statute, is not a sufficient reason for denying a trial upon the writ. *People* v. *Capoldi, supra.* Finally, the court is required to liberally construe the facts stated in a sex offender's writ of recovery. *People* v. *Holmstead,* 32 Ill. 2d 306, 205 N.E. 2d 625 (Ill. 1965)

II.

THE DECISION BELOW RENDERS THE ILLINOIS SEXUALLY DANGEROUS PERSONS ACT UNENFORCEABLE.

Because of the nature of the issues to be determined by the trier of fact in ISDPA proceedings, the evidentiary standard of beyond a reasonable doubt is peculiarly inapplicable. In determining whether a person is sexually dangerous as defined by § 105–1.01 of the ISDPA, the trier of fact must make three discreet determinations. The first determination is that the defendant committed *past acts* of sexual assault or sexual molestation of children. The second determination is in the nature of a medical conclusion, that the person is suffering from a mental disorder that has existed for a period of not less than one year. Each of these determinations, since they are matters of past or present historical fact which are empirically determinable through the testimony of witnesses, are susceptible of proof beyond a reasonable doubt. The third determination to be made by the trier of fact, however, is a predictive one: whether, in light of the person's mental state and past behavior, he is likely to commit acts of sexual assault or sexual molestation of children in the future. Given the present knowledge of human behavior and the uncertainty inherent in psychiatric diagnosis of dangerousness, predictions of future behavior cannot be made with the certainty required by the standard of beyond a reasonable doubt.[5] For while it can be proved be-

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5. See Rubin, *Prediction of Dangerousness in Mentally Ill Criminals,* Archives of General Psychiatry, XXVII, 397 (1972); and Beck et al., *Reliability of psychiatric diagnoses; a study of consistency of clinical judgments and ratings,* American Journal of Psychiatry, vol. 119, p. 351–356 (1962).

yond a reasonable doubt that a person committed certain acts in the past, it cannot be proved beyond a reasonable doubt that he is therefore bound to commit similar acts in the future. As stated by Judge Sobeloff in his concurrence in *Tippett* v. *Maryland,* 436 F. 2d 1153, 1165 (4th Cir. 1971), such a subjective judgment cannot attain the same "state of certitude" demanded in criminal cases.

The People of the State of Illinois have a great interest in maintaining the enforceability of the ISDPA. Certainly, the State has a great interest in protecting its members from persons who have demonstrated their dangerousness by the commission of serious offenses in the past, even though their future behavior cannot be predicted beyond a reasonable doubt. *O'Connor* v. *Donaldson,* ——U.S.——, 43 U.S.L.W. 4929 (U.S. June 24, 1975); concurring opinion by Chief Justice Burger, 43 U.S.L.W. at 4933; *United States* v. *Brown,* 478 F. 2d 606 (D.C. Cir. 1973). This is especially true of sexual psychopaths, who of all categories of the mentally ill are the most likely recidivists.[6]

If the criminal law standard of proof is to be strictly applied, the Illinois Sexually Dangerous Persons Act will have been declared unconstitutional in fact if not by the Court's explicit holding, since the effect of its decision is to render the Act unenforceable.

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6. Glazer, et al., *The Violent Offender: Parole Decision Making,* Dept. of Health, Education and Welfare, Office of Juvenile Delinquency and Youth Development, Government Printing Office, 1966.

III.

THE SEVENTH CIRCUIT COURT OF APPEALS ERRONEOUSLY APPLIED THE DOCTRINE OF *IN RE WINSHIP* AS CONTROLLING THE STANDARD OF PROOF IN ILLINOIS SEXUALLY DANGEROUS PERSON ACT PROCEEDINGS.

In ruling that due process required the employment of the standard of proof beyond a reasonable doubt in ISDPA proceedings, the Court below held that this Court's decision in *In re Winship,* 397 U.S. 358 (1970), was controlling. This application of the *Winship* doctrine to ISDPA proceedings was clearly erroneous, however, since the nature of the ISDPA proceedings and the type of determinations required thereunder make this case plainly distinguishable from the facts in *Winship,* and make the reasonable doubt standard required by *Winship* particularly unworkable.

First of all, unlike the criminal or juvenile proceedings considered in *Winship,* where the *factual* issue of prior guilt or innocence must be resolved,[7] the issue to be resolved by the trier of fact in ISDPA proceedings is essentially predictive in nature, aimed at forecasting whether a person who has committed past sexual offenses, and is afflicted with a mental disorder, is likely to be dangerous to others in the future by reason of a propensity to commit sexual assaults or acts of molestation of children. In

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7. As stated in *In re Winship,* 397 U.S. at 363: "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions *resting on factual error.*" (Italics added.)

performing this predictive function, the trier of fact must necessarily be guided by psychiatric opinion which, by its very nature, cannot be conclusive in predicting future dangerousness beyond a reasonable doubt.

The fact that imposition of the reasonable doubt standard would render the ISDPA unenforceable also serves to distinguish this case from *In re Winship*. In *Winship*, this Court based its decision, in part, on the fact that the use of the reasonable doubt standard would not have a distruptive effect on juvenile proceedings:

> "Use of the reasonable-doubt standard will not disturb New York's policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, and that juvenile proceedings are confidential. Nor will there be any effect on the informality, flexibility, or speed of the hearing at which the fact-finding takes place." (397 U.S. at 366.)

Use of the reasonable-doubt standard in this case would have an effect not only on the hearing itself, but on the number of persons who could receive treatment under the ISDPA. Likewise, it would have a disruptive effect on the "fact-finding" that takes place in a hearing. The purpose of commitment is to confine and treat persons found to have the propensity for committing sexual assaults and sexual molestation of children in the future; requiring a jury to determine a defendant's propensity for future acts beyond a reasonable doubt is an impossible burden. Unlike the juvenile hearing in *Winship*, the jury here is being asked to predict the future based on the past. Such an undertaking is fraught with uncertainties and is certainly not determinable beyond a reasonable doubt.

Furthermore, the ISDPA provides that the proceeding for commitment is completely civil in nature, and that the provisions of the Illinois Civil Practice Act are to apply in all respects. *Ill. Rev. Stat.* Chap. 38, § 105–3.01. In a proceeding under the Act the defendant is not charged with a crime nor, should he be found sexually dangerous, will he be committed on the basis of guilt of any crime. Nor is there any inference of moral blameworthiness, since a finding of sexual dangerousness indicates that a defendant's inability to conform to the dictates of the law is a product of his mental illness. Thus commitment under the ISDPA, unlike criminal incarceration, is not intended as punishment. On the contrary, the purpose of the proceeding is to determine the defendant's propensity to commit sexual assaults in the future, and to determine if he is in need of treatment designed to effect recovery from his condition. These differences make any analogy to proceedings under the Juvenile Court Act, as in *Winship*, completely improper, since a conviction of delinquency nevertheless results in a guilty finding on a criminal offense, and he is committed to custody for the commission of a criminal offense no less than is an adult.

Finally, the decision below was erroneous in requiring adherence to the *Winship* doctrine in ISDPA proceedings, even though this Court's decisions in *Specht* v. *Patterson*, 386 U.S. 605 (1966) and *Humphrey* v. *Cady*, 405 U.S. 504 (1972) had not required proof beyond a reasonable doubt in sex offender cases. The Seventh Circuit reasoned that *Specht* was not determinative of the issue, since that decision was rendered prior to the decision in *Winship* declaring the reasonable-doubt standard to be of constitutional stature. However, this Court's decision in *Humphrey* v. *Cady*, *supra*, was issued some two years after *Win-*

ship. Significantly, this Court acknowledged that under the procedure in issue in *Humphrey.* "If the State establishes the need for treatment by a preponderance of the evidence, the court must commit the defendant for treatment. . . ." (405 U.S. at 507.) This Court made no suggestion that this procedure would be invalid, or that the jury should be held to a higher standard of proof. For all of these reasons, the correctness of the decision below is open to serious question.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

Copy of opinion and judgment of Court of Appeals.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 74-1155

UNITED STATES OF AMERICA *ex rel.*
FRANK STACHULAK,

Petitioner-Appellee,

v.

JOSEPH COUGHLIN, et al.,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division,
No. 73 C 861
ABRAHAM L. MAROVITZ, *Judge*

Argued January 6, 1975 — Decided August 6, 1975

Before FAIRCHILD, *Chief Judge,* STEVENS *and* SPRECHER, *Circuit Judges.*

FAIRCHILD, *Chief Judge.* Petitioner Frank Stachulak was committed to the custody of the Illinois Director of Corrections pursuant to the Illinois Sexually Dangerous

Persons Act, Ill. Ann. Stat., ch. 38, § 105-1.01 (Smith-Hurd 1970) *et seq.*, and confined at the Psychiatric Division of the Illinois State Penitentiary at Menard in 1969. Four years later he brought this action under the federal habeas corpus statutes, 28 U.S.C. § 2241 et seq., and Civil Rights Act, 42 U.S.C. § 1983, challenging both the lawfulness of his detention and the conditions of his confinement. The district court granted habeas corpus relief, *Stachulak* v. *Coughlin*, 369 F. Supp. 628 (N.D. Ill. 1973), and respondents, Illinois correctional officials, appeal. We affirm.

I

Under the Illinois Sexually Dangerous Persons Act, the state may seek an involuntary indeterminate institutional commitment in lieu of a criminal prosecution if a person is charged with a criminal offense and believed to be sexually dangerous. Ill. Ann. Stat., ch. 38, § 105-3. By the Act's terms, *Id.* § 105-1.01,

> All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.

Upon receipt of a petition alleging sexual dangerousness, a state circuit court appoints two psychiatrists to examine the person so charged. *Id.* § 105-4. The defendant is entitled to counsel and may demand a jury trial. *Id.* § 105-5. If, after a hearing, he is found to be sexually dangerous, he is committed to the custody of the Director of Corrections for care and treatment. *Id.* § 105-8. Once committed, a defendant can only secure his release by proving to the

committing court that he is no longer sexually dangerous. *Id.* § 105-9.

The Act is silent as to what burden the state must meet to establish that a defendant is sexually dangerous. In accordance with the statute's designation that proceedings under the Act are "civil in nature," *Id.* § 105-3.01, the state trial judge instructed the jury that they could find Stachulak to be a sexually dangerous person if the state had proved its case by a preponderance of the evidence. Relying primarily on *In Re Winship*, 397 U.S. 358 (1970), the district court held that the Due Process Clause of the Fourteenth Amendment requires that the state's case for commitment must be proven by the more stringent beyond-a-reasonable-doubt standard applied in criminal actions. The court then ordered Stachulak enlarged unless within 60 days the state sought a renewed commitment order in proceedings in conformity to this holding.

Respondents contend on appeal that the reasonable doubt burden of proof is not constitutionally mandated for proceedings under the Sexually Dangerous Persons Act.

II

Although neither of the parties questioned our appellate jurisdiction, it is incumbent upon us to address this issue, for it concerns our power to hear the case. See *Carson* v. *Allied News Co.*, 511 F. 2d 22, 23 (7th Cir. 1975).

The habeas corpus statutes follow the general rule that only final orders are subject to appellate review. 28 U.S.C. § 2253. Stachulak's complaint sought relief simultaneously under the habeas statutes, 28 U.S.C. § 2241 *et seq.* and the Civil Rights Act, 42 U.S.C. § 1983. The district court granted the habeas relief, but reserved ruling on the sec-

tion 1983 claim pending further proceedings. The state appealed from the habeas order, but did not request and receive from the district judge an express determination, pursuant to Rule 54(b), Fed. R. Civ. P.,[1] that there was "no just reason for delay" and that final judgment should be entered. In the ordinary civil action involving multiple claims such a determination would be required for finality and appellate jurisdiction.

Through Rule 81(a)(2), Fed. R. Civ. P., the Federal Rules of Civil Procedure are applicable to habeas corpus proceedings "to the extent that such practice is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions."[2] The drafts-

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1. Rule 54(b) reads:

Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for relay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

2. Our research revealed only two cases in which Rule 54(b) was mentioned in a habeas corpus proceeding, *Stewart* v. *Bishop*, 403 F. 2d 674 (8th Cir. 1968) and *Gray* v. *Swenson*, 430 F. 2d 9 (8th Cir. 1970). *Stewart* was decided prior to *Harris* v. *Nelson*, 394 U.S. 286 (1969), discussed in the text *infra*, and *Gray* accepted *Stewart's* application of the rule without reference to the analysis found in Harris. Moreover, these decisions dealt with cases in which there were more than one habeas claim, rather than a case like ours where habeas and non-habeas claims were joined.

men of the rule plainly did not intend that *ipso jure* all the civil rules were operative in habeas actions. "Such specific evidence as there is with respect to the intent of the draftsmen of the rules indicates nothing more than a general and nonspecific understanding that the rules would have very limited application to habeas corpus proceedings." *Harris* v. *Nelson*, 394 U.S. 286, 295 (1969). Thus, our court has not applied the rules of civil procedure as a matter of course in habeas corpus cases. See *Bijeol* v. *Benson*, 513 F. 2d 965 (7th Cir. 1975) (Rule 23 inapplicable).

The Supreme Court in *Harris* v. *Nelson*, *supra*, suggested that the central considerations in determining the reach of Rule 81(a)(2) are the intended scope of the Federal Rules of Civil Procedure and the history of habeas corpus proceedings. There, the Court read Rule 81(a)(2) to exclude application of Rule 33 in habeas corpus actions because the discovery rules "are ill-suited to the special problems and character of such proceedings." 394 U.S. at 296. Although an amendment to Rule 81(a)(2) had changed the language, the Court apparently deemed that there was no change of substance. 394 U.S. at 394, footnote 3.

A similar analysis compels a like result in this case. The essence of habeas corpus is that it provides "a prompt and efficacious remedy for whatever society deems to be

intolerable restraints." *Fay* v. *Noia,* 372 U.S. 391, 401-02 (1963), See also *Preiser* v. *Rodriguez,* 411 U.S. 475, 495-96 (1973) and 28 U.S.C. § 2243. To delay an appeal from an order granting or denying such relief pending disposition of another claim, such as the civil rights claim here, conflicts with the emphasis on prompt decision. Since application of Rule 54(b) would necessarily result in delay in any case where the district court refused to enter a 54(b) order, the draftsmen of the civil rules must not have contemplated the rule's application in habeas corpus proceedings like the present one, where claims for non-habeas relief were joined and accepted along with claims for habeas relief.

We have also noted that an Illinois appellate court, relying on the decision of the district court in this case, recently held that the standard of proof for commitment under the Illinois Sexually Dangerous Persons Act is proof beyond a reasonable doubt, rather than preponderance of the evidence. *People* v. *Pembrock,* 23 Ill. App. 3d 991, 320 N.E. 2d 470 (1974), *leave to appeal granted,* —Ill. 2d—. This decision does not directly affect petitioner Stachulak nor moot his case, although it adopts the rule he seeks. The decision has not yet become final, and does not appear to be a construction of state law, but appears to rest on federal constitutional grounds. It does not foreclose or excuse us from independently examining the federal question presented.

III

We have no doubt that the principles of due process in general must govern proceedings brought under the Sexually Dangerous Persons Act. Individuals who are committed pursuant to its terms most surely suffer a "grievous loss." *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972). The crux of this case is determining what process is due.[3] Recognizing that proceedings under the Act closely resemble criminal prosecutions, the Illinois courts have accorded some of the safeguards applicable in a criminal trial to individuals charged with sexual dangerousness. *People* v. *Studdard,* 51 Ill. 2d 190, 195-97, 281 N.E. 2d 678, 681 (1972). For example, in addition to statutory rights to a hearing, jury trial, and counsel, Ill. Ann. Stat., ch. 38, § 105-5, a defendant is entitled to the right to confront and cross-examine witnesses, *People* v. *Nastasio,* 19 Ill. 2d 524, 529-30, 168 N.E. 2d 728, 731 (1960), the right against self-incrimination, *People* v. *English,* 31 Ill. 2d 301, 307, 201 N.E. 2d 455, 459 (1964) and the right to speedy trial, *People* v. *Beshears,* 65 Ill. App. 2d 446, 459, 213 N.E. 2d 55, 62 (1965).

Respondents, citing *Specht* v. *Patterson,* 386 U.S. 605 (1967), contend that these rights and procedures are all that due process requires. In *Specht* the Court held that an individual could not be sentenced under the Colorado Sex Offenders Act, a statute similar in purpose to the one before us, unless he was accorded the fundamental protections of due process. Among these safeguards only the rights to be present with counsel, to be heard and offer evidence, and to confront and cross-examine witnesses

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3. The question of the appropriate standard of proof in civil commitment proceedings under the Illinois Mental Health Code, Ill. Ann. Stat., ch. 91½, § 1-1 *et seq.* (Smith-Hurd 1974), is not before us. We do note, however, that an Illinois appellate court has recently held that the need for mental treatment in such proceedings need only be proved by clear and convincing evidence. *People* v. *Sansone,* 18 Ill. App. 3d 315, 309 N.E. 2d 733 (1974), *leave to appeal denied,* 56 Ill. 2d 584.

were mentioned; no reference was made to the requisite burden of proof. 386 U.S. at 610. However, the burden of proof question was not presented in *Specht*, and it was not until several years later that the constitutional stature of the reasonable-doubt standard was explicitly affirmed. *In re Winship*, 397 U.S. 358, 364 (1970). In consequence, *Specht's* failure to mention the reasonable-doubt standard as a due process requirement is not dispositive.

We agree with the district court that *In re Winship*, *supra*, is controlling. *Winship* held that the reasonable-doubt standard was an "essential of due process and fair treatment" and thus applicable in adjudicatory juvenile delinquency hearings. The holding was grounded on the fact that, just as in a criminal prosecution, an adverse judgment raised the possibility of a loss of liberty and the certainty of stigmatization as a violator of the criminal law. 397 U .S. at 366-67.

Here, the loss of liberty is as great, if not greater, than the loss in *Winship*. The violator of the criminal law — be he an adult or juvenile — is imprisoned, if at all, in almost all cases for a definite term. The person found to be sexually dangerous, in stark contrast, is committed for an indeterminate period and is unable to attain his freedom until he can prove that he is no longer sexually dangerous.[4] Likewise with respect to stigma an involuntary com-

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4. The instant case illustrates the potential disparity in the magnitude of the loss. Stachulak was originally charged with Indecent Solicitation of a Child in violation of Ill. Ann. Stat., ch. 38, § 11-6 (Smith-Hurd 1969). That offense carried a maximum penalty of a $500 fine and less than one year imprisonment in a penal institution other than a penitentiary. Instead of prosecuting him on that charge, the state brought a proceeding, which culminated in an indeterminate commitment, under the Sexually Dangerous Persons Act. For the last five years, Stachulak has been confined at the Psychiatric Division of the Illinois State Penitentiary at Menard, a maximum-security penal institution.

mitment for sexual dangerousness presents an a fortiori case: Unlike the delinquency proceedings in *Winship*, these actions are not confidential, and an adjudication of sexual dangerousness is certainly more damning than a finding of juvenile delinquency.

Respondents nevertheless assert that the gravity of the incarcerated individual's loss is mitigated by the fact that the purpose of the commitment is to treat and cure the dangerous sexual deviant.[5] But this assertion is archaic.

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5. Commitment of the mentally ill has been conventionally justified on two bases: the state's *parens patriae* authority to protect and care for the mentally ill and the state's police power to protect members of society against threat to their persons and property. *O'Connor* v. *Donaldson*, 43 U.S. L.W. 4929, 4933 (U.S. June 26, 1975); *Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972). See Developments in the Law—Civil Commitments of the Mentally Ill, 87 Harv. L. Rev. 1190, 1207-28 (1974). While the Sexually Dangerous Persons Act specifies that the commitment is for treatment, Ill. Ann. Stat., ch. 38, § 105-8 (Smith-Hurd 1975), the Act's concern with dangerousness makes it clear that it rests on both these justifications. Nevertheless, since the Act is an alternative to a criminal prosecution, it is also in a very real sense a penal measure. Although in our view this factor has no bearing on the nature of the individual's potential deprivation of liberty, it fortifies our conclusion that due process requires proof of sexual dangerousness beyond a reasonable doubt.

All too often the "promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits." *Cross* v. *Harris*, 418 F. 2d 1095, 1107 (D.C. Cir. 1969). It is well settled that realities rather than benign motives or noncriminal labels determine the relevance of constitutional policies. *In re Winship, supra*, 397 U.S. at 365-66. See *In re Gault*, 387 U.S. 1, 21, 27, 50 (1967); *Breed* v. *Jones*, 43 U.S.L.W. 4644, 4647 (U.S. May 27, 1975).

Respondents and the State's Attorney of Cook County as Amicus Curiae also assail the reasonable-doubt standard as unworkable. Given the uncertainties inherent in the present state of psychiatric diagnosis and prediction, it is impossible, they argue, to prove beyond a reasonable doubt that a person is suffering from a mental disorder with a propensity to commit criminal sexual assaults. We are not unaware of the limitations of psychiatric diagnosis. Proof of mental state, however, is a commonplace in the law, and despite the difficulty of establishing many controverted facts in a criminal trial, we steadfastly adhere to the reasonable-doubt burden of proof. *Mullaney* v. *Wilbur*, 43 U.S.L.W. 4695, 4700-01 (U.S. June 9, 1975). If the disparate opinions of psychiatrists and the vagaries of proof and prediction suggest anything, it is the desirability of the utmost care in reaching the commitment decision. See, *e.g.*, Livermore, Malmquist & Meehl, On the Justifications for Civil Commitment, 117 U. Pa. L. Rev. 75 (1968).

Burdens of proof serve to allocate the risk of an erroneous decision between the parties in a lawsuit, and the reasonable-doubt standard reflects society's judgment "that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship, supra*, 397 U.S.

at 372. (Harlan, J., *concurring*). We recognize that society has a substantial interest in the protection of its members from dangerous deviant sexual behavior. But when the stakes are so great for the individual facing commitment, proof of sexual dangerousness must be sufficient to produce the highest recognized degree of certitude, *In re Ballay*, 482 F. 2d 648, 667 (D.C. Cir. 1973); *Lessard* v. *Schmidt*, 349 F. Supp. 1078, 1095 (E.D. Wis. 1972) (three-judge court), *vacated on other grounds*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated on other grounds*, 43 U.S.L.W. 3600 (U.S. May 12, 1975); *People* v. *Burnick*, 43 U.S.L.W. 2478 (Cal. Sup. Ct. May 15, 1975). But see *Tippett* v. *State of Maryland*, 436 F. 2d 1153 (4th Cir. 1971), *cert. dismissed as improvidently granted sub nom.*, *Murel* v. *Baltimore City Criminal Court*, 407 U.S. 355; *Lynch* v. *Baxley*, 386 F. Supp. 378, 393 (M.D. Ala. 1974) (three-judge court). See generally, Developments in the Law — Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1295-1302 (1974).

Accordingly, we hold that due process requires that the reasonable-doubt standard be applied in proceedings under the Illinois Sexually Dangerous Persons Act.

IV

Stachulak also challenges the Sexually Dangerous Persons Act as void for vagueness and overbreadth in violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses. This attack was rejected by the district court, and respondents contend that Stachulak is barred from raising the issue in this court due to his failure to maintain a cross-appeal. Initially, Stachulak had filed a cross-appeal, but on his own motion this was dismissed pursuant to Rule 42(b), F.R.A.P. Now, he relies

on the rule that an appellee may urge any ground of record of the lower court's judgment. *Dandridge* v. *Williams*, 397 U.S. 471, 475-76. n. 6 (1970).

Whether a cross-appeal must be taken depends upon the position an appellee seeks to advance and its effect on the lower court's judgment.

> Without a cross-appeal, an appellee may "urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435. What he may not do in the absence of a cross-appeal is to "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *Ibid.* The rule is inveterate and certain. *Morley Co.* v. *MD. Casualty Co.*, 300 U.S. 185, 191 (1937).

The judgment of the district court ordered that if the state did not bring a renewed commitment proceeding within 60 days, Stachulak was to be enlarged. If Stachulak were to prevail on his contention that the statute is unconstitutional he would be entitled to his freedom instanter and could not be subject to a renewed commitment proceeding. It is plain therefore that he is not merely attempting to support the judgment but rather to expand

his rights under the decree. Accordingly, in the absence of a properly maintained cross-appeal, the statute's constitutionality is not before us.[6]

For the reasons set forth above, the judgment appealed from is AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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6. Although Rule 3(c), F.R.A.P., does not require a specification of error, filing a cross-appeal places the appellant on notice that an appellee is attacking the judgment. In the instant case, for example, appellants, gauged by their initial brief, apparently thought that the question of the statute's validity was no longer contested after Stachulak dismissed his cross-appeal.

While our application of the rule may be considered technical, the rule nonetheless has continuing vitality and must be followed. *Swarb* v. *Lennox*, 405 U.S. 191, 201 (1972). See generally Stern, When to Cross-Appeal or Cross-Petition — Certainty or Confusion? 87 Harv. L. Rev. 763 (1974); 9 J. Moore & B. Ward, Moore's Federal Practice ¶204.11[3] (2nd ed. 1973). See also Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit 34 (1973).